91-788

No. _____

Supreme Court, U.S.
FILED
NOV 12 1991
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

HOWARD INAFUKU,

Petitioner,

vs.

THE UNITED STATE OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHERMAN M. ELLISON, ESQ.
14900 Magnolia Boulevard
Post Office Box 56656
Sherman Oaks, California 91413
(818) 994-8888

Attorney for Petitioner
HOWARD INAFUKU

Lorraine Mitchell Legal Briefs

732 E. WASHINGTON BOULEVARD
LOS ANGELES, CALIFORNIA 90021-3088
(213) 747-5631 • FAX: (213) 747-5843

CONTENTS REPRODUCED FROM FURNISHED PRETYPED COPY.

ISSUES PRESENTED

1. Did the district court err by imposing a 10-year mandatory minimum sentence in Count VI of the indictment, pursuant to 21 U.S.C. Sec. 841(b)(1)(viii), when the methamphetamine transactions necessary to support such a sentence occurred prior to the effective date of the statute?

2. Did the district court err in denying INAFUKU's pre-sentence motion to withdraw his guilty plea, when INAFUKU entered the guilty plea because of his counsel's and the district court's misadvice about critical sentencing consequences?

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW..... 2

TABLE OF AUTHORITIES..... i

OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS..... 5

STATEMENT OF JURISDICTION..... 6

STATEMENT OF THE CASE..... 8

ARGUMENT..... 21

I. THE IMPOSITION OF THE 10-YEAR MANDATORY MINIMUM SENTENCE ON COUNT VI PURSUANT TO 21 U.S.C. § 841(b)(1)(A)(viii) WAS A VIOLATION OF THE EX POST FACTO CLAUSE OF THE UNITED STATES CONSTITUTION..... 21

II. THE DISTRICT COURT ERRED BY DENYING INAFUKU'S MOTION TO WITHDRAW HIS GUILTY PLEA BECAUSE OF MISADVICE ABOUT CRITICAL SENTENCING CONSEQUENCES..... 34

CONCLUSION..... 66

APPENDIX..... 67

PROOF OF SERVICE..... 69

TABLE OF AUTHORITIES

CASES

Boykin v. Alabama, 395 U.S. 238 (1969) . . . 31

Brady v. United States, 397 U.S. 742 (1970) . . . 32, 33

Bunker v. Wise, 550 F.2d 1155 (9th Cir. 1977) 49

Calder v. Bull, 3 Dall. 386 (1798) . . . 19, 21

Carter v. McCarthy, 806 F.2d 1373 (9th Cir. 1986) 44

Government of Canal Zone v. Tobar, 565 F.2d 1321 (5th Cir. 1978) 48, 49

Hammond v. United States, 528 F.2d 15 (4th Cir. 1975) 40, 41

Iaea v. Sunn, 800 F.2d 861 (9th Cir. 1986) 32, 37, 38, 42

Iaea v. Sunn, Civ. No. 83-1372 (D. Hawaii Dec. 23, 1986) . . . 38

Kadwell v. United States, 315 F.2d 667 (9th Cir. 1963) 54, 55

Kennedy v. Maggio, 725 F.2d 269 (5th Cir. 1984) 39

Kercheval v. United States, 274 U.S. 220 (1927) 54, 55

Marks v. United States,

430 U.S. 188
(1977) . . . 19

McMann v.
Richardson,
397 U.S. 759
(1970) . . . 32

Miller v.
Florida,
482 U.S. 423
(1987) . . . 22,
23

O'Tuel v.
Osborne,
706 F.2d 498
(4th Cir.
1983) 39,
40

Strader v.
Garrison,
611 F.2d 61
(4th Cir.
1979) 40

United States ex
rel. Hill v.
Ternullo,
510 F.2d 844
(2d Cir.
1975) 41

United States ex
rel. Leeson v.
Damon,
496 F.2d 718
(2d Cir.),
cert. denied,
419 U.S. 954
(1974) . . . 41

United States v. Alejandro, 569 F.2d 1200 (2d Cir. 1978) 47

United States v. Calabrese, 825 F.2d 1342 (9th Cir. 1987) 26, 27

United States v. Colunga, 786 F.2d 659 (5th Cir. 1986), cert. denied, 484 U.S. 857 (1987) . . . 45

United States v. Crusco, 536 F.2d 21 (3d Cir. 1976) 50

United States v. Davis, 212 F.2d 264 (7th Cir. 1954) 56

United States v. Del Prete, 567 F.2d 928 (9th Cir. 1978) 47, 48

United States v. Del Valle-Rojas, 463 F.2d 228 (9th Cir. 1972) 54

United States v. Erlenborn, 483 F.2d 165 (9th Cir. 1973) 54

United States v. Fairhurst, 388 F.2d 825 (3d Cir.), cert. denied, 392 U.S. 912 (1968) . . . 60

United States v. Gibbs, 813 F.2d 596 (3d Cir.), cert denied, 484 U.S. 822 (1987) . . . 28, 29

United States v. Harris, 534 F.2d 141 (9th Cir. 1976) 50

United States v. Herrold, 635 F.2d 213 (3d Cir. 1980) 46

United States v. Jaramillo-Suarez, 857 F.2d 1368 (9th Cir. 1988) 44

United States v. Kay, 537 F.2d 1077 (9th Cir. 1976) 31

United States v. Morgan, 567 F.2d 479 (D.C. Cir. 1977) 58

United States v. Navarro-Flores, 628 F.2d 1178 (9th Cir. 1980) 31

United States v. Pinkerton, 328 U.S. 640 (1964) . . . 25

United States v. Pressley, 602 F.2d 709 (5th Cir. 1979) 59, 60

United States v. Restrepo, 903 F.2d 648 (9th Cir. 1990) 18

United States v. Savage, 561 F.2d 554 (4th Cir. 1977) 57

United States v. Shapiro, 16 F.R.D. 499 (E.D. Wis.), appeal dismissed, 222 F.2d 836 (7th Cir. 1955) 61

United States v. Sharon, 812 F.2d 1233 (9th Cir. 1987) 44

United States v. Tammaro, 93 F.R.D. 826 (N.D. Ga. 1982) 56

United States v. Thomas, 415 F.2d 1216 (9th Cir. 1986) 54

United States v. Webster, 468 F.2d 769 (9th Cir. 1972), cert. denied, 410 U.S. 934 (1973) . . . 55

United States v. Wolak, 510 F.2d 164 (6th Cir. 1975) 51

Weaver v. Graham, 450 U.S. 24 (1981) . . . 22

STATUTES

21 U.S.C. Sec. 841(b)(1)(viii). . 1, 5, 6, 14, 18

21 U.S.C. § 846 . . . 5

26 U.S.C. § 7203. . . 6

28 U.S.C. § 1257(3) . . . 4

Federal Rule of Criminal Procedure 32 (d) . . . 52

Hawaii Code of Professional Responsibility, Canon 7 . . . 37

Hawaii Code of Professional Responsibility,

Disciplinary Rule 6-101(A)(1)(2) . . 37

MISCELLANEOUS

Comment, Federal Criminal Procedure and Withdrawal of Guilty Pleas, 22 U. Chi. L. Rev. 730, 736 (1955) . . . 55, 62

Note, Pre-Sentence Withdrawal of Guilty Pleas in Federal Courts, 40 N.Y.U. L. Rev. 759, 762 (1965) . . . 53, 54

Note, The Withdrawal of the Plea of Guilty, 79 U. Pa. L. Rev. 484, 489 (1931) . . . 53, 56, 57

Note, Withdrawal of Guilty Pleas Under

Rule 32(d), 64 Yale L.J. 590, 598 (1955) . . . 55, 57

Project, Nineteenth Annual Review of Criminal Procedure, 78 Geo. L.J. 699, 1005-06 (1990) . . . 32

Criminal Procedure Under the Federal Rules, Sec. 32:41, (1967) . . . 54

OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

An official report of an opinion of this case was issued by the United States Court of Appeal for the Ninth Circuit. The case number of this case appeal is 90-10188. A copy of the opinion is attached hereto as the appendix.

No.

IN THE

SUPREME COURT OF THE UNITED STATES

May Term, 1992

HOWARD INAFUKU,
Petitioner,

-vs-

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE NINTH CIRCUIT COURT OF APPEALS

STATEMENT OF JURISDICTION

The petitioner invokes the jurisdiction of the Honorable Court to review the decision of the Ninth Circuit

Court of Appeals, affirming his conviction and sentence in the Central District Court of the State of California. The petitioner contends the Ninth Circuit Court has decided a federal question in a way that conflicts with applicable decisions of this Court. The date of entry of the judgment sought to be reviewed herein is July 10, 1991. A petition for rehearing and a suggestion for a hearing en banc was filed in the Ninth Circuit Court of Appeals on July 24, 1991. The petition was denied pursuant to an order issued on September 11, 1991. No orders granting an extension of time within which time to file this petition for writ of certiorari have been issued. The petitioner asserts this Court has jurisdiction to review the judgment in question by writ of certiorari, as set forth in 28 U.S.C. § 1257(3).

STATEMENT OF THE CASE

A. The Indictment

On August 17, 1991, Defendant-Petitioner HOWARD INAFUKU was indicted. Counts I through III charged him with violating 21 U.S.C. § 841(a)(1), to wit, possession with intent to distribute methamphetamine, a Schedule II non-narcotic controlled substance. Counts I and II both involved the possession of on kilogram of methamphetamine. Count I related to July 23, 1987, while Count II related to August 1-15, 1988. Count III involved the possession of eight ounces of methamphetamine on December 14, 1988.

Counts IV through VI of the indictment charged INAFUKU with violating 21 U.S.C. § 846, to wit, conspiring to possess with intent to distribute over 100 grams of methamphetamine in violation of 21 U.S.C. § 841(a)(1). Count IV related

to the time period of July 1988-August 1988, Count V related to the time period of October 1988, and Count VI concerned 62 different transactions, only two of which occurred after November 18, 1988, the effective date of the mandatory minimum sentencing provision codified at 21 U.S.C. § 841(b)(1)(A)(viii).

Counts VII and VIII of the indictment charged INAFUKU with violating 26 U.S.C. § 7203 by failing to file income tax returns for 1987 and 1988, respectively.

B. The Guilty Plea

On December 4, 1989, a Memorandum of Plea agreement was filed in the district court, wherein INAFUKU agreed to cooperate with the government and to plead guilty to all counts of the

indictment except Count V. (E.R. 10-19[1]) The Memorandum of Plea Agreement contained important provisions which could lead to a sentence reduction as the result of INAFUKU's anticipated post-plea cooperation with the government. (E.R. 17-18)

On December 4, 1989, INAFUKU entered a guilty plea to Counts I through IV and VI through VIII. (12/4/89 Transcript) At the plea hearing, the court informed INAFUKU that the sentence for Counts III and VI was "not less than ten years." (Id. at 16) During the plea hearing, INAFUKU's counsel was apparently unfamiliar with key portions of the indictment. Counsel interrupted while the court was reading aloud the overt acts listed in Count IV of the indictment, and

---

[1]. "E.R." refers to Defendant-Petitioner's Excerpt of Record filed with the Ninth Circuit Court of Appeal.

erroneously told the court that one of the overt acts related to Count V. (Id. at 8) Counsel then incorrectly informed the court, "These overt acts are listing the acts of both Count Four and Five." (Ibid. emphasis added.) The prosecutor immediately corrected these erroneous statements, pointing out that the overt acts for Counts IV and V occurred during different time periods. (Ibid.)

C. The Plea Withdrawal Motion

On January 17, 1990, defendant moved for the substitution of Reginald P. Minn as his attorney-of-record. ((E.R. 76) INAFUKU filed a motion to withdraw his guilty plea on March 22, 1990. (E.R. 3-42) The government opposed the motion. (E.R. 43-55)

INAFUKU's plea withdrawal motion argued that he was improperly induced to enter his guilty plea because his former

counsel erroneously told him (1) that he was subject to a 10-year mandatory minimum term of imprisonment on Counts III and VI, and (2) that he could receive a Sentencing Guideline offense level of 37 to 39, which could result in a maximum sentence of 327 months (over 27 years) of imprisonment. (E.R. 35-37) INAFUKU's motion also argued that the district court itself erroneously informed him during the course of the plea hearing that he was subject to the 10-year mandatory minimum term of imprisonment. (E.R. 36-37) INAFUKU noted that the Presentence Report had set his offense level at 30, which (without the 10-year mandatory minimum sentence) could result in imprisonment of as little as 97 months. Thus, he urged that he had been intimidated into entering his guilty plea by the exaggerated information concerning the severity of his potential sentence.

(E.R. 36, 41-42)

The offense level of 30 resulted in a sentencing range of only 120 to 121 months even if the mandatory minimum sentence was imposed. At the hearing on the plea withdrawal motion on March 28, 1990, INAFUKU testified that his former counsel had told him before the guilty plea that his offense level would be about 37-39, which would result in a sentence of about 25 to 27 years. (3/28/90 Tr. at 23-24) INAFUKU related that counsel had stated that he was subject to the 10-year mandatory minimum sentence on Counts III and VI. (Ibid.) He testified that counsel told him that it was best to plead guilty pursuant to the plea agreement, in order to try to lower his sentence as much as possible. (Id. at 24) INAFUKU further testified that the misinformation provided by counsel affected his decision to plead

guilty. (Ibid) INAFUKU thought that he had "no choice," because the cooperation provisions of the agreement were the only way he could lower his sentence. (Id. at 30, 52)

INAFUKU also testified that he did not have the time to read the plea agreement carefully before signing it immediately prior to the plea proceeding as "we had to rush." (Id. at 23) Thus, he "wasn't kind of sure about a lot of things." (Id. at 43) He had reviewed the plea agreement in prison during prior meetings with counsel, but without the "last-minute changes" which were later incorporated into it. (Id. at 25-27) Prior to the plea hearing, counsel pointed out the changes "really briefly." (Id. at 25)

INAFUKU had decided not to ask counsel about certain questions he had

concerning the plea agreement because "it seemed like he [counsel] was getting upset" over INAFUKU's lack of understanding. (Id. at 29) Counsel told INAFUKU that the federal sentencing guidelines were "really new" and had "just come out" at that time, that "he never did any federal cases before," and that "he didn't understand everything that was mentioned in there [the sentencing guidelines]." (Id. at 38)

INAFUKU's former counsel did not appear as a witness at the hearing. However, the government and INAFUKU stipulated that if called as a witness counsel would testify that he reviewed the plea agreement with INAFUKU on at least three occasions; that he told INAFUKU to read the agreement and ask any questions he had; that INAFUKU did ask questions; that counsel explained certain of the

"most crucial" provisions of the agreement to INAFUKU; and that counsel believed that at the end of the process INAFUKU understood all the provisions of the agreement. (Id. at 36-37) The parties also stipulated that counsel gave INAFUKU an estimate, but not a guarantee, of a sentencing guideline offense level of 37 to 39; and that counsel told INAFUKU that INAFUKU might lower his sentence by cooperation with the government, but that there was no guarantee that such cooperation would lower INAFUKU's sentence. (Ibid.)

The district court denied the plea withdrawal motion, ruling that INAFUKU had not received ineffective assistance of counsel and that INAFUKU had not shown a fair and just reason for withdrawing the plea. (Id. at 63-67)

D. The Sentencing

At the March 30, 1990, sentencing hearing, INAFUKU stipulated (1) that Count III involved 226 grams of contraband, (2) that Count VI involved between 1,000 and 4,024 grams of contraband, and (3) that between 100 and 311.3 grams of the total Count VI amount of contraband related to post-November 18, 1988, transactions. (3/30/90 Tr. at 3-5) INAFUKU argued that 21 U.S.C. § 841(b)(1)(A)(viii) permitted imposition of a 10-year mandatory minimum sentence only for an offense involving either (a) 100 grams or more of pure methamphetamine, or (b) 1000 grams or more of a mixture or substance containing methamphetamine. He argued that the 226 grams of contraband involved in Count III did not meet either of these tests, because this quantity was under 1000 grams and there was no proof of

the purity of the methamphetamine (which was never sized by the government). He also argued that only the amount of contraband concerning the post-November 18, 1988, conduct for Count VI (between 100 and 311.3 grams) could be considered in deciding whether to impose the mandatory minimum sentence, because November 18, 1988, was the effective date of the mandatory minimum sentencing statute. Inasmuch as there was no proof of the purity of this unseized contraband, which weighed less than 1000 grams, it did not meet either of the two tests for imposing the mandatory minimum sentence. (3/30/90 Tr. at 9-12, 14-15; see also E.R. 29-32)

The district court ruled that the mandatory minimum sentencing statute required a quantity of at least 100 grams of pure methamphetamine or at least 1000

grams of a mixture or substance containing methamphetamine. (Id. at 23) Thus, the court ruled that it would not impose the mandatory minimum sentence in Count III. (Ibid.) However, the court ruled that as to Count VI it would consider all of the contraband involved, not just the post-November 18, 1988, transactions. Thus, the court imposed the mandatory minimum sentence upon Count VI on the basis that INAFUKU had conspired to distribute more than 1000 grams of a substance with a detectable amount of methamphetamine. (Id. at 22-24.)

INAFUKU was sentenced to concurrent 10-year terms of imprisonment for Counts I through IV and Count VI, and to one year terms of imprisonment for Counts VII and VIII (concurrent to each other and to the 10-year terms). (E.R. 69) INAFUKU was also sentenced to

concurrent five-year terms of supervised release for Counts I through IV and Count VI, and to one-year terms of supervised release for Counts VII and VIII (concurrent to each other and to the five-year terms). (E.R. 70) Finally, the district court imposed a $17,500 fine upon INAFUKU. (E.R. 70) The court stated that although INAFUKU's financial profile and employment record "indicate that you have no available assets," INAFUKU reportedly had $307,000 in income during the period of 1987-88 and reportedly had used friends and relatives to purchase gold and stolen jewelry for him. (3/30/90 Tr. at 32-33). INAFUKU is currently incarcerated at Terminal Island in California.

ARGUMENT

I. THE IMPOSITION OF THE 10-YEAR MANDATORY MINIMUM SENTENCE ON COUNT VI PURSUANT TO 21 U.S.C. § 841(b)(1)(A)(viii) WAS A VIOLATION OF THE EX POST FACTO CLAUSE OF THE UNITED STATES CONSTITUTION.

A. Standard for review

Because the only issue presented to this court pertaining to petitioner's sentencing concerns whether the imposition of the 10-year mandatory minimum imposed pursuant to 21 U.S.C. § 841(b)(1)(A)(viii) was in violation of the constitutional proscriptions against laws enacted ex post facto, the issue is solely one of law and must be reviewed de novo, giving due deference to the district court's application of the facts, none of which are disputed. United States v. Restrepo, 903 F.2d 648, 651 (9th Cir. 1990).

B. Argument

Article I of the Constitution prohibits ex post facto laws both in section 9, clause 3 and section 10, clause 1. Marks v. United States, 430 U.S. 188, 191 (1977). These ex post facto prohibitions are "a limitation upon the powers of the legislature," and are based upon the principle "that persons have a right to fair warning of that conduct which will give rise to criminal penalties -- [a principle which is] fundamental to our concept of constitutional liberty." Id.

The seminal case discussing these ex post facto provisions, Calder v. Bull, 3 Dall. 386 (1798) (opinion of Chase, J.), discussed the clauses purposes as follows:

> "The prohibition against their making any ex post facto laws

was introduced for greater caution, and very probably arose from the knowledge, that Parliament of Great Britain claimed and exercised a power to pass such laws, under the denomination of bills of attainder, or bills of pains and penalties; . . . . Sometimes they respected the crime by declaring acts to be treason, which were not treason when committed; at other times they violated the rules of evidence . . . ; at other times they inflicted punishments, where the party was not, by law, liable to any punishment; and in other case, they inflicted greater punishment, than the law annexed to the offense. --The ground for

the exercise of such legislative power was this, that the safety of the kingdom depended on the death, or other punishment,of the offender; as if traitors, when discovered, could be so formidable, or the government so insecure! With few exceptions, the advocates of such laws were stimulated by ambition, or personal resentment, and vindictive malice. To prevent such, and similar, acts of violence and injustice, I believe, the Federal and State Legislatures, were prohibited from passing any bill of attainder; or any ex post facto law." Id. at 389 (footnotes omitted).

Justice Iredell, in his

concurring opinion in Calder, noted a further basis for constitutional prohibition against ex post facto laws encompassing a fundamental principal "that legislative enactments 'give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed.'" Miller v. Florida, 482 U.S. 423, 429 (1987), quoting Weaver v. Graham, 450 U.S. 24, 28-29 (1981).

The ex post facto clause was thereafter construed to prohibit a statute from retrospectively increasing a sentence for criminal conduct which has occurred prior to the effective date of the statute, whether such an increase is accomplished directly or indirectly. Weaver v. Graham, 450 U.S. 24 (1981); Miller v. Florida, 482 U.S. 423 (1987).

In Miller v. Florida, 482 U.S. 423 (1987), a state's guidelines

sentencing system was revised, after the date of the defendant's offenses, to increase the number of points assigned to sexual offenses. This resulted in an increased sentence for the defendant. Id. at 424-428. The Supreme Court held that the statute violated the ex post facto prohibition because it "makes more onerous the punishment for crimes committed before its enactment." Id. at 435.

In INAFUKU's case, the district court used transactions which occurred prior to the effective date of the mandatory minimum sentencing law to push the total amount of contraband over the necessary level for the mandatory minimum sentence to apply to Count VI. It was only as of November 18, 1988 (the effective date of that law), that INAFUKU was provided notice that trafficking in quantities of contraband above the level

specified in that law could result in the imposition of the mandatory minimum terms set forth in that law. After November 18, 1988, INAFUKU did not traffic in such quantities.

INAFUKU is aware of the general principle that a conspiracy may be punished under the sentencing law in effect at the time of the conspiracy's termination. However, he urges that his case does not fall within this general principle. The application of a penalty provision punishing conspiracy in general does not depend upon the specific quantity of contraband transacted. In INAFUKU's case, the mandatory minimum sentence for Count VI is entirely dependent upon the amount of contraband transacted. The district court's ruling would permit application of the mandatory minimum sentence to a defendant who possessed no

contraband after the effective date of the law, as long as the conspiracy existed one day after the law became effective. Even more distressing, because of the ongoing changes in federal criminal legislation, future changes in the law--for instance, the addition of new crimes for which capital punishment can be imposed--could be imposed in a mischievesous and tragic retroactive manner if this interpretation of conspiracy laws is permitted.

For example, prosecutors, simply by arbitrarily including a conspiracy count in an indictment, could seek the death penalty for crimes occurring years before the enactment of the law. This situation is exacerbated even further where, like in the scenario in United States v. Pinkerton, 328 U.S. 640 (1964), a co-conspirator commits a foreseeable act after the date of the change of law, which

then exposes the defendant to the more severe penalty when, in fact, no overt act was committed by the defendant after the effective date of the legislation.

The two cases relied upon by the district court in ruling upon this issue (3/30/90 Tr. at 22-23) are readily distinguishable. In United States v. Calabrese, 825 F.2d 1342 (9th Cir. 1987), defendants Calabrese and Logan were convicted for a conspiracy that existed from October 1982 to November 2, 1984, a defendant Logan was also convicted of manufacturing and distributing methamphetamine from November 1983 to November 2, 1984. Id. at 1344-45. The increased maximum sentence of the Comprehensive Crime Control Act of 1984 became effective on October 12, 1984, before the termination of the aforementioned continuing offenses, and

the district court imposed these increased maximum sentences upon Calabrese and Logan. Id. at 1345-46. This court held that such sentences did not violate the ex post facto prohibition. Id. at 1346.

In Calabrese, however, the increased maximum sentence did not depend upon illegal acts which occurred prior to the effective date of the new law. As long as the defendants committed any portion of the charged offenses after October 12, 1984, they were subject to the increased sentence. In INAFUKU's case, by contrast, imposition of the mandatory minimum sentence in count VI explicitly depended upon his trafficking activity which occurred prior to November 18, 1988. The mandatory minimum term could not be applied without reference to, or consideration of, his illegal actions that pre-dated the law.

In United States v. Gibbs, 813 F.2d 596 (3d Cir.), cert denied, 484 U.S. 822 (1987), Gibbs was convicted of participating in a marijuana conspiracy. Id. at 598-99. The conspiracy "began in the spring of 1979 and ended on or about October 6, 1980." Id. at 602. The enhanced maximum sentence provision which the district court imposed upon Gibbs, for an offense involving over 1,000 pounds of marijuana, became effective on September 26, 2980. Ibid. The Third Circuit ruled that application of this provision to Gibbs' offense did not violate the ex post facto prohibition. Ibid. However, the indictment against Gibbs specifically charged that "on October 5, 1980, he had a telephone conversation relative to the plane load of marijuana and that on October 6, 1980, the airplane landed with 1,487 pounds of marijuana." Ibid. "Most

important, it was never disputed at trial that the amount of marijuana involved [on the airplane] was in excess of 1,000 pounds." Id. at 603. Thus, unlike INAFUKU's case, Gibbs' sentence was wholly supported by his illegal transactions occurring after the effective date of the sentencing statute.

In essence, INAFUKU received a 10-year mandatory minimum sentence on Count VI only because the district court used pre-November 18, 1988, trafficking activity to reach the contraband quantity level necessary to impose such a sentence. This retrospective application of the law to increase the severity of INAFUKU's sentence was unconstitutional.. moreover, the court's incorrect determination that the 10-year minimum was applicable in

\\\

\\\

Count VI resulted in a miscalculation of the appropriate guideline range for Counts II through IV. (3/30/90 Tr. at 26)

II. THE DISTRICT COURT ERRED BY DENYING INAFUKU'S MOTION TO WITHDRAW HIS GUILTY PLEA BECAUSE OF MISADVICE ABOUT CRITICAL SENTENCING CONSEQUENCES

A. Standard of Review

"On appeal from the denial of a motion for leave to withdraw the plea, the standard of review is whether the trial court abused its discretion." United States v. Navarro-Flores, 628 F.2d 1178, 1183 (9th Cir. 1980); accord. United States v. Kay, 537 F.2d 1077, 1078 (9th Cir. 1976).

B. Argument

A guilty plea waives several of the defendant's most important constitutional rights -- his right against selfincrimination, his right to confront the witnesses against him, and his right to a trial by jury. Boykin v. Alabama, 395

U.S. 238, 242-43 (1969). It also waives appellate review of most non-jurisdictional claims not related to the validity of the plea itself. Project, Nineteenth Annual Review of Criminal Procedure, 78 Geo. L.J. 699, 1005-06 (1990). Entry of a guilty plea is a "grave and solemn act." Brady v. United States, 397 U.S. 742, 748 (1970). It must be "accepted only with care and discernment." Id.

Thus, to be "voluntary" in the context of the Fifth Amendment due process of law, the guilty plea must be "a knowing, intelligent act done with sufficient awareness of the relevant circumstances and likely consequences." Id. (emphasis added); see McMann v. Richardson, 397 U.S. 759, 766 (1970); Iaea v. Sunn, 800 F.2d 861, 865 (9th Cir. 1986). A knowing and intelligent plea is

"entered by one fully aware of the direct consequences . . . . " Brady v. United States, 397 U.S. at 755. The plea cannot be induced by misrepresentation. Id.

As discussed infra, INAFUKU's guilty plea was induced by his counsel's ineffective representation and the district court's violation of Federal Rule of Criminal Procedure 11(c)(1). It was definitely not a knowing and intelligent plea entered with sufficient awareness of the likely consequences.

1. Counsel's Advice On INAFUKU's Guideline Offense Level And The Applicability Of The 10-Year Mandatory Minimum Sentence Was Erroneous

INAFUKU's former counsel admittedly advised him that his Sentencing Guidelines offense level was an estimated

37 to 39. (3/28/90 Tr. at 37) This offense level, if it had been correct, would have resulted in a sentence range of about 25 to 27 years. (3/28/90 Tr. at 23) Actually, however, INAFUKU's offense level was 30. This offense level resulted in a sentencing range of 120-121 months even applying the 10-year mandatory minimum sentence (Presentence Report at 12), and could have resulted in a sentence as low as 97 months if the 10-year mandatory minimum sentence had not been applied. (E.R. 36)

INAFUKU's former counsel also advised him that he was subject to the 10-year mandatory minimum sentence on Counts III and IV. (3/28/90 Tr. at 23-24). As discussed supra in Section I, the district court did not apply the mandatory minimum sentence to Count III and should not have applied it to Count VI.

2. The District Court's Advice On The Applicability Of The 10-Year Mandatory Minimum Sentence Was Erroneous

At INAFUKU's plea hearing the district court instructed him that the sentence for Counts III and IV was "not less than ten years." (12/4/89 Tr. at 16) As discussed supra in Section I, the district court subsequently did not apply the mandatory minimum sentence to Count III, and should not have applied it to Count VI.

3. The Guilty Plea Was Not Entered With The Effective Assistance Of Counsel

Because of his counsel's misadvice, INAFUKU labored under the misapprehension that he faced a sentencing range of 25 to 27 years, and a mandatory minimum sentence of 10 years. INAFUKU knew

that the only way he could reduce such a severe sentence was through the plea agreement's provision for cooperation with the government and the consequent opportunity for a sentence reduction motion by the government. INAFUKU believed that he had "no choice" but to plead guilty. (3/28/90 Tr. at 30, 52) If INAFUKU had been accurately informed that his sentence could be as low as 97 months, he could have made a knowing and intelligent choice to forego the plea agreement and proceed to trial.

Such misadvice might have been avoided if counsel had been more familiar with the Sentencing Guidelines and the mandatory minimum sentencing law for methamphetamine.[2] The fact that these

---

2. Counsel's general lack of diligence was evident at the plea hearing, where he did not realize that the overt acts listed in the indictment for Counts IV and V occurred during different time

provisions were relatively new is not important. Counsel was under a duty to represent INAFUKU "zealously." Hawaii Code of Professional Responsibility, Canon 7. "A lawyer shall not: (1) Handle a legal matter which he knows or should know he is not competent to handle, without associating with a lawyer who is competent to handle it, (2) Handle a legal matter without preparation adequate in the circumstances." Hawaii Code of Professional Responsibility, Disciplinary Rule 6-101(A)(1)(2).

In circumstances comparable to the case at bar, courts have held that guilty pleas improperly induced by defense counsel violated due process. In most of these cases, defense counsel, in good faith, gave the defendant mistaken advice about sentencing factors.

---

periods. [12/4/89 Tr. at 8]

In Iaea v. Sunn, 800 F.2d 861 (9th Cir. 1986), the defendant's counsel misadvised him about the applicability of a minimum sentencing statute and about his probable sentence if he pled guilty. The court of appeal remanded the case to the district court to determine whether there was a reasonable probability that the misadvice had induced the guilty plea and that the defendant was thereby prejudiced. The court stressed that a guilty plea "must be a knowing, intelligent act done with sufficient awareness of the relevant circumstances and likely consequences." Id. at 865. The court also emphasized that defense "counsel have a duty to supply criminal defendants with necessary and accurate information." Id. Upon remand, the district court found prejudice to the defendant and vacated the guilty plea. Iaea v. Sunn, Civ. No. 83-1372 (D. Hawaii

Dec. 23, 1986).

In Kennedy v. Maggio, 725 F.2d 269 (5th Cir. 1984), defense counsel erroneously advised the defendant that he would face the death penalty if he were convicted at trial. The guilty plea was held invalid because counsel's misadvice had not permitted the defendant to "make an informed and conscious choice." Id. at 272.

In O'Tuel v. Osborne, 706 F.2d 498 (4th Cir. 1983), the defendant's counsel misinformed him that if he pled guilty to second-degree murder he would be eligible for parole after serving 10 years of imprisonment. Actually, the defendant would had to have served 20 years to obtain parole eligibility. The court held that the plea was not knowing and intelligent because defense counsel's

gross misadvice was relied upon by the defendant in reaching his decision to plead guilty. Even though avoiding the death penalty was the defendant's "major concern," the misadvice about parole still made the guilty plea invalid. Id. at 501.

In Strader v. Garrison, 611 F.2d 61 (4th Cir. 1979), the defendant was told by his attorney that if he pled guilty it would not affect the parole eligibility date on a sentence he was currently serving. Actually, his counsel misadvised him since the guilty plea would result in a seven-year delay in parole eligibility. The court held that the guilty plea was not knowing and intelligent because the defendant relied upon the misadvice. Id. at 65.

In Hammond v. United States, 528 F.2d 15 (4th Cir. 1975), defense counsel told the defendant that if he was

convicted on all counts at trial instead of pleading guilty, he faced a 90-year sentence. Actually, the defendant was only subject to a 55-year term if he proceeded to trial. The court found that the defendant's subsequent guilty plea was not knowing and intelligent, since "in order to plead voluntarily, a defendant must know the direct consequences of any plea, including the actual value of any commitments made to him." Id. at 19.

In United States ex rel. Hill v. Ternullo, 510 F.2d 844 (2d Cir. 1975), the defendant contended that his defense counsel had misadvised him on the minimum and maximum amount of incarceration he could receive. The court remanded the case for factual findings, and directed the district court to grant relief if the plea was entered without an understanding of the true sentences possible under the

circumstances. See also United States ex rel. Leeson v. Damon, 496 F.2d 718 (2d Cir.) (defense counsel fails to inform defendant that he is subject to increased sentence because of his age; guilty plea must be set aside because based upon such misadvice), cert. denied, 419 U.S. 954 (1974).

In conclusion, "'an intelligent assessment of the relative advantages of pleading guilty is frequently impossible without an attorney."' Iaea v. Sunn, 800 F.2d at 865 (quoting Brady v. United States, 397 U.S. at 748 n.6). In INAFUKU's case, his attorney offered him a "gross mischaracterization of the likely outcome." Ibid. This was particularly inexcusable in a Guidelines case. The Guidelines' step by step, empirical approach to sentencing attempts to "minimize the discretionary powers of the

sentencing court," to promote "uniformity in sentencing by narrowing the wide disparity in sentences imposed by different federal courts for similar criminal conduct by similar offenders," and to promote "proportionality in sentencing through a system that imposes appropriately different sentences for conduct of different severity." Sentencing Guidelines Sec. 1A3, at 1.2-1.3. The Guidelines permit counsel to "no longer work in the dark" when determining the likely sentence a defendant will receive, because they "create a clear, definitive expectation" of the sentence that will be imposed. Id., Sec. 1A4(c), at 1.8.

4. The Guilty Plea Was Entered In Violation Of Federal Rule Of Criminal Procedure 11(c)(1)

Federal Rule of Criminal

Procedure 11(c)(1) requires the district court, before accepting a guilty plea, to inform the defendant of various important penal consequences of his plea and to ensure that he understands those consequences, such as the maximum sentence, the effect of a special parole term or supervised release term, and "the mandatory minimum penalty provided by law, if any. . . ." [Emphasis added.] Failure to comply with such requirements of Rule 11(c)(1) can result in reversible error. E.g., United States v. Jaramillo-Suarez, 857 F.2d 1368 (9th Cir. 1988) (the court vacates guilty plea because district court did not inform defendant of maximum sentence); United States v. Sharon, 812 F.2d 1233 (9th Cir. 1987) (the court vacates guilty plea because district court did not inform defendant of special parole term); cf. Carter v. McCarthy, 806 F.2d

1373 (9th Cir. 1986) (the court affirms habeas corpus relief when state court failed to inform defendant of mandatory parole term).

In INAFUKU's case, as discussed supra in subsection C, the district court misinformed him at the plea hearing that the mandatory minimum sentence of 10 years applied to Counts III and VI. As the case law discussed below demonstrates, such crucial misinformation about a direct consequence of the plea violated the requirements of Rule 11.

In United States v. Colunga, 786 F.2d 659 (5th Cir. 1986), cert. denied, 484 U.S. 857 (1987), "Colunga was told [by the district court] that the maximum prison sentence was ten years, five for each count." Id. at 658. However, on appeal it was determined that the actual maximum sentence was fifteen to twenty

years. Id. Thus, the court held that "Colunga should be given the opportunity to plead anew with correct information regarding the maximum possible punishment." Ibid.

In United States v. Herrold, 635 F.2d 213 (3d Cir. 1980), the district court left the defendant with the impression "that he faced a maximum sentence of forty-five years," but actually the defendant could only receive a maximum sentence of 25 years. Id. at 214. The appeals court held that this Rule 11 violation mandated that the defendant be permitted to "plead anew." Id. at 215-16. As the court stressed, Rule 11 "is designed to insure that the pleader is made aware of the outer limits of punishment. At the very least, this means that he must be apprised of the period of required incarceration." Id. (emphasis

added).

In United States v. Alejandro, 569 F.2d 1200 (2d Cir. 1978), the district court informed the defendant that he could receive a maximum prison sentence of 15 years and "a special parole term of at least three years." Id. at 1201. Actually, the defendant was subject to a maximum special parole term of life. Id. The appeals court recognized that "where the [district] court has failed to comply with that rule [Rule 11(c)] the plea must be treated as a nullity," and ruled that the "guilty plea must therefore be vacated and the defendant given the opportunity to plead again to the indictment." Id. at 120102.

In United States v. Del Prete, 567 F.2d 928 (9th Cir. 1978), the district court informed the defendant that a three year special parole term could be imposed,

but actually the three-year special parole term was the minimum term which could be imposed and it was mandatory. Id. at 929. The court quoted Rule 11(c)(1), including the portion concerning mandatory minimum penalties, and emphasized that "[d]isclosure of the factors set forth in Rule 11 is mandatory." Ibid. This court held that the district court's noncompliance with Rule 11 concerning the true nature of the mandatory minimum parole term "requires us to set aside the defendant's conviction and remand the case." Ibid.

Further, the court in Del Prete rejected the government's argument that the Rule 11 violation was "cured by a written guilty plea application which Del Prete signed" that contained the proper Rule 11 advice. Id. at 930.

In Government of Canal Zone v.

Tobar, 565 F.2d 1321 (5th Cir. 1978), the district court advised the defendant that the maximum sentence was 15 years, but the actual maximum sentence was life imprisonment. Id. at 1321. The appeals court held: "Because the district court failed to comply with Rule 11 in accepting Tobar's guilty plea, Tobar must be allowed to plead anew." Id.

In Bunker v. Wise, 550 F.2d 1155 (9th Cir. 1977), the district court properly advised the defendant of the maximum prison sentence and fine, but did not advise him of a mandatory minimum special parole term of three years. Id. at 1156. The Court of Appeal for the Ninth Circuit held that the mandatory minimum parole term was a direct consequence of the plea, and thus that the district court's failure to comply with Rule 11 mandated that "Bunker should be afforded

the opportunity to plead anew." Id. at 1158-59.

In United States v. Crusco, 536 F.2d 21 (3d Cir. 1976), the district court left the defendant with the impression that the maximum length of his combined imprisonment and special parole term was seven years, while actually the maximum term of imprisonment was seven years, in addition to a minimum three year special parole term. Id. at 23-24. The appeals court ruled that the defendant "was not unambiguously informed of the maximum punishment he faced," and that the Rule 11 violation, "although inadvertent," entitled the defendant "to withdraw his guilty plea and plead anew." Id. at 25.

In United States v. Harris, 534 F.2d 141 (9th Cir. 1976), the district court failed to advise the defendant "that a mandatory six-year special parole term

would be appended to his sentence." Id. at 142. The court stressed that Rule 11(c)(1) "specifies inter alia that the [district] court must advise the defendant of 'the mandatory minimum penalty provided by law, if any . . .,"' and ordered the district court to "set aside the judgment and conviction, and permit the defendant to withdraw his plea of guilty and plead anew." Ibid.

In United States v. Wolak, 510 F.2d 164 (6th Cir. 1975), the district court did not accurately advise the defendant of the three-year mandatory special parole term. Id. at 165. Rather, the district court advised the defendant that there was a special parole term of "up to three years." Id. at 166 (emphasis added in original). The appeals court held that the district court had to accurately advise a defendant of a mandatory minimum

sentencing provision, and instructed the district court "to vacate the sentence and to permit petitioner to plead anew." Ibid.

Thus, Rule 11(c)(1) was violated by the inaccurate information the district court gave INAFUKU regarding the 10-year mandatory minimum sentence. This misadvice contributed to INAFUKU's decision to plead guilty and the plea should be vacated.

5. The Guilty Plea Should Have Been Set Aside Pursuant To Federal Rule of Criminal Procedure 32 (d)

Federal Rule of Criminal Procedure 32 (d) states in relevant part: "If a motion for a withdrawal of a plea of guilty . . . is made before sentence is imposed . . . the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason." (Emphasis added.) When a

defendant moves to withdraw a guilty plea prior to sentence being imposed, as did INAFUKU, he has no opportunity to use the withdrawal motion as a device to gamble upon the length of sentence that the court will impose on the guilty plea. The judicial process has not been finalized prior to sentencing, and there is little possibility of prejudice to the prosecution if the plea is withdrawn at that time. See Note, Pre-Sentence Withdrawal of Guilty Pleas in Federal Courts, 40 N.Y.U.L. Rev. 759, 762 (1965); see also Note, The Withdrawal of the Plea of Guilty, 79 U. Pa. L. Rev. 484, 489 (1931) (prior to sentence being imposed defendant cannot use plea withdrawal as device to speculate upon severity of sentence that court will impose).

Prior to imposition of sentence the court should permit withdrawal of a

guilty plea "if for any reason the granting of the privilege seems fair and just." Kercheval v. United States, 274 U.S. 220, 224 (1927); see 5 L. Orfield, Criminal Procedure Under the Federal Rules, Sec. 32:41, at 233 (1967); Note, Pre-Sentence Withdrawal of Guilty Pleas in Federal Courts, supra, at 759. Before imposition of sentence the withdrawal of the plea will cause only slight inconvenience, Kadwell v. United States, 315 F.2d 667, 670 (9th Cir. 1963), so such withdrawal motions must be "freely allowed." Id.; accord United States v. Erlenborn, 483 F.2d 165, 168 (9th Cir. 1973); United States v. Del Valle-Rojas, 463 F.2d 228, 229 (9th Cir. 1972); United States v. Thomas, 415 F.2d 1216, 1217-18 (9th Cir. 1986).

The assumed guilt or innocence of the accused should not be material to

the decision concerning pre-sentence plea withdrawal. Kercheval v. United States, 274 U.S. at 224; United States v. Webster, 468 F.2d 769, 771 (9th Cir. 1972), cert. denied, 410 U.S. 934 (1973); Kadwell v. United States, 315 F.2d at 670 n.12. "In a society which considers a lack of due process a form of injustice irrespective of the guilt or innocence of the person involved, allegations of innocence would seem unnecessary." Comment, Federal Criminal Procedure and Withdrawal of Guilty Pleas, 22 U. Chi. L. Rev. 730, 736 (1955); see Note, Withdrawal of Guilty Pleas Under Rule 32(d), 64 Yale L.J. 590, 598 (1955).

Even when the accused is in fact guilty, it is important that he not be turned over to the correctional authorities who are supposed to reform him while he believes that he has been

unfairly "railroaded" into an unjust plea. Comment, Withdrawal of a Plea of Guilty, 22 J. of Crim. L. & Criminology 199, 202 (1941); Note, The Withdrawal of the Plea of Guilty, supra, at 491. The more severe the sentence, the more important it is that withdrawal of a guilty plea should have been allowed. Id. at 488. This principle applies to INAFUKU, who is currently serving a mandatory minimum ten-year sentence.

A court should permit pre-sentence plea withdrawal when, as in INAFUKU's case, the plea was induced by "misapprehension of the defendant's legal rights." United States v. Tammaro, 93 F.R.D. 826, 828 (N.D. Ga. 1982); see United States v. Davis, 212 F.2d 264, 267 (7th Cir. 1954). The primary question should be: "Was the accused misled by any cause whatsoever as to . . . the effect of

his plea . . . ?" Comment, Withdrawal of a Plea of Guilty, supra, at 202. It is imperative "that no defendant be sentenced who has entered his plea because of misapprehension." Id.; see Note, Withdrawal of Guilty Pleas Under Rule 32(d), supra, at 599.

Even assuming arguendo that the above-discussed misadvice of INAFUKU's counsel and the district court regarding sentencing did not clearly violate constitutional standards or Rule 11, such misadvice generated misapprehension in INAFUKU's mind and created a "fair and just reason" for permitting a presentence withdrawal of the guilty plea pursuant to Rule 32(d). Comparison with other cases where defendants raised issues regarding their misapprehension demonstrates the propriety of allowing a plea withdrawal in INAFUKU's case.

In United States v. Savage, 561 F.2d 554, 556-57 (4th Cir. 1977), the defendant entered a plea agreement for the prosecution to recommend a five-year sentence. The defendant assumed the court would likely follow the sentence recommendation until the court stated otherwise prior to sentencing. The defendant's motion to withdraw the guilty plea was denied by the district court, and a 10-year sentence was imposed. The appellate court remanded the case to the district court with instructions to permit the defendant to withdraw the plea unless the prosecution could show prejudice from a withdrawal.

In United States v. Morgan, 567 F.2d 479, 492-94 (D.C. Cir. 1977), the defendant pled guilty under the misapprehension that an insanity defense would probably not be successful. Since

the defendant would soon be too old to qualify for Youth Corrections Act sentencing, he entered the plea. Later, before sentencing, a psychiatric report demonstrated that the chances for an insanity defense were much better than the defendant had originally thought. The appellate court reversed the lower court's denial of the defendant's pre-sentencing motion to withdraw the guilty plea, holding that the lower court had abused its discretion in denying the motion.

In United States v. Pressley, 602 F.2d 709 (5th Cir. 1979), the defendant moved prior to sentence to withdraw his guilty plea. The appellate court noted that he "may not have understood that the plea bargaining arrangement allowed the judge to impose a sentence as severe as ten years' imprisonment." Id. at 711. The appellate

court remanded the case to the district court for a hearing, emphasizing that if the defendant "was mistaken as to the terms of the plea bargain, his original plea must be deemed less than a fully knowledgeable waiver of his rights." Id. The court indicated that if "there appears to be any reason to allow withdrawal of a guilty plea prior to sentencing, leave should be freely granted," and recognized that courts "must always be diligent to ascertain whether a plea of guilty was understandingly made" or entered "as a result of mistake." Id.

In United States v. Fairhurst, 388 F.2d 825, 826-27 (3d Cir.), cert. denied, 392 U.S. 912 (1968), defense counsel misinformed the defendant that he would probably receive a one year sentence if he pled guilty. Defense counsel had based his advice on the district judge's

statements at the pretrial conference. The defendant pled guilty and received a three-year sentence. The district court then granted the defendant's post-sentence motion to withdraw his guilty plea because of defense counsel's misadvice.

The defendant in United States v. Shapiro, 16 F.R.D. 499, 500-01 (E.D. Wis.), appeal dismissed, 222 F.2d 836 (7th Cir. 1955), thought that he was a United States citizen. Thus, he pled nolo contendere to a charge without the knowledge that the Immigration and Naturalization Service would or could institute deportation proceedings against him after his conviction. The district court granted the defendant's motion to withdraw the plea after such deportation proceedings were instituted.

As the foregoing cases and authorities illustrate, the rule

permitting plea withdrawal should be construed broadly to assist defendants who act in good faith. See Comment, Federal Criminal Procedure and Withdrawal of Guilty Pleas, supra, at 737.

CONCLUSION

For all the foregoing reasons, INAFUKU's conviction should be vacated, with instructions that the district court permit him to withdraw his guilty plea and plead anew. Assuming arguendo that the convictions are not vacated, INAFUKU's case should be remanded for resentencing, with instructions that the district court not impose the 10-year mandatory minimum sentence.

DATED: November 7, 1991

Respectfully submitted,

SHERMAN ELLISON
Attorney at Law

By: _____
SHERMAN ELLISON
Attorney for Petitioner
HOWARD INAFUKU

INDEX TO APPENDIX

APPENDIX		PAGE
A	OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT	1
B	DISTRICT COURTS RULING ON MOTION TO WITHDRAW PLEA	8
C	TRANSCRIPT OF SENTENCING IN THE DISTRICT COURT	16

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

HOWARD INAFUKU, aka Howie,
Defendant-Appellant.

No. 90-10188

D.C. No.
CR-89-01197-ACK

OPINION

Appeal from the United States District Court
for the District of Hawaii
Alan C. Kay, District Judge, Presiding

Argued and Submitted
June 10, 1991—San Francisco, California

Filed July 10, 1991

Before: Procter Hug, Jr., Mary M. Schroeder and
Charles Wiggins, Circuit Judges.

Opinion by Judge Schroeder

SUMMARY

Criminal Sentencing

Affirming a district court judgment of sentence, the court of appeals held that the ex post facto clause was not violated by the inclusion of methamphetamine involved prior to the effective date of a statute imposing a mandatory minimum sentence in the determination of the quantity involved in the ongoing conspiracy after the effective date of the statute.

Appellant Howard Inafuku was convicted of drug-related charges. The minimum ten-year sentence required by 21 U.S.C. § 841(b)(1) was imposed because the amount of methamphetamine mixture involved in the conspiracy exceeded 1,000 grams. The statute became effective November 18, 1988. The conspiracy for which Inafuku received the mandatory minimum sentence began before that date and ended after that date. At sentencing, the parties stipulated that the total amount of methamphetamine mixture involved in the conspiracy exceeded 1,000 grams, but that at most only 311 grams were involved after November 18, 1988. Inafuku argued that the district court violated the ex post facto clause of the Constitution by including the methamphetamine involved in the conspiracy prior to November 18, 1988, in calculating the quantity involved in the conspiracy.

[1] When there is a change in the level of punishment that becomes effective during the course of an ongoing conspiracy, it is not a violation of the ex post facto clause of the Constitution to apply the law as it exists at the end of the conspiracy in fashioning a punishment for convicted conspirators. Punishment for conspiracy attaches not to the substantive offenses committed during the course of the conspiracy, but to the agreement to commit those offenses, which embraces the entire period during which the conspiracy was in effect. [2] Recognizing that conspiracy is a continuing offense, the Guidelines contemplate the aggregation of all amounts of contraband involved in a conspiracy in determining the appropriate punishment for the conspiracy. [3] Thus, agreeing with the Fourth Circuit, the court held that the principles of conspiracy allow a defendant to be punished for becoming a party to an agreement to facilitate the commission of substantive offenses, regardless of whether that defendant is also to be punished for those substantive offenses themselves. Therefore, at the point of entering an agreement, a conspirator becomes accountable for all conduct of the conspiracy, and proof of a slight connection to the conspiracy is sufficient to support such accountability. [4] Since agreement to partici-

pate in the conspiracy occurs not only at the point of entry into the conspiracy but also on an ongoing basis until withdrawal or cessation of the conspiracy, it does not violate the prohibition against ex post facto laws to apply the standards that were in effect at the point at which the conspiracy terminated, in order to punish Inafuku for conspiracy to distribute the entire amount of contraband actually involved in the conspiracy. Because Inafuku failed to disengage from the conspiracy before the harsher punishment provisions became effective or before it had sold over 1,000 grams of contraband, his conduct was punishable under the mandatory minimum sentence provisions after those provisions took effect.

COUNSEL

Reginald P. Minn, Honolulu, Hawaii, for the defendant-appellant.

Joseph Douglas Wilson, United States Department of Justice, Washington, D.C., for the plaintiff-appellee.

OPINION

SCHROEDER, Circuit Judge:

Howard Inafuku appeals from the sentence which was imposed following his plea of guilty to multiple crimes involving methamphetamine, as well as failure to file income tax returns. The principal issue on appeal concerns imposition of the minimum ten-year sentence required pursuant to 21 U.S.C. § 841(b)(1). The sentence was imposed because the amount of methamphetamine mixture involved in the relevant conspiracy exceeded 1,000 grams.[1] The statute became effec-

---

[1]The statute as presently codified to eliminate a typographical error in effect at the time of this sentence, and which is not material to this appeal, is as follows:

tive November 18, 1988. The conspiracy for which Inafuku received the mandatory minimum sentence began before that date and ended after that date. Inafuku contends that the district court violated the ex post facto clause of the Constitution by including the methamphetamine involved in the conspiracy prior to November 18, 1988 in calculating the quantity involved in the conspiracy.

At sentencing, the parties stipulated that the total amount of methamphetamine mixture involved in the conspiracy exceeded 1,000 grams, but that at most only 311 grams were involved after November 18, 1988. The district court, over Inafuku's objection, aggregated the amounts of methamphetamine involved both before and after the effective date of the statute and applied the ten-year minimum. It did so on the authority of *United States v. Calabrese*, 825 F.2d 1342 (9th Cir. 1987). In *Calabrese* we held that increased penalties contained in the Comprehensive Crime Control Act of 1984 applied to a methamphetamine conspiracy that began before the effective date of the Act and continued after it. We there applied the new law because there was substantial evidence to show that the conspiracy continued past its effective date.

The ex post facto clause of the United States Constitution, Article I, Section 9, bars the imposition of increased punishment retroactively to criminal conduct that occurred prior to the effective date of the increase. *See Miller v. Florida*, 482 U.S. 423 (1987). The issue we must resolve, therefore, is whether aggregation of amounts of contraband distributed before and after the effective date of the statute, but during the course of a single ongoing conspiracy, is an unconstitutionally retroactive application of post-enactment standards.

In the case of a violation of . . . this section involving 100 grams or more of methamphetamine, . . . or 1 kilogram or more of a mixture or substance containing a detectable amount of methamphetamine, such person shall be sentenced to a term of imprisonment which may not be less than 10 years . . . .

[1] Conspiracy is a continuing offense, which is charged and punished as one crime from beginning to end. *See Calabrese*, 825 F.2d at 1346. The crime of conspiracy is entirely separate from the completed substantive offenses committed pursuant to the conspiracy, and it is appropriately punished as a separate offense. *Id.* When there is a change in the level of punishment that becomes effective during the course of an ongoing conspiracy, it is not a violation of the ex post facto clause of the Constitution to apply the law as it exists at the end of the conspiracy in fashioning a punishment for convicted conspirators. *Id. See also United States v. Sheffer*, 896 F.2d 842, 844-45 (4th Cir.), *cert. denied*, 111 S. Ct. 432 (1990); *United States v. White*, 869 F.2d 822, 826 (5th Cir.), *cert. denied*, 109 S. Ct. 3172 (1989). This rule is consistent with the principle that punishment for conspiracy attaches not to the substantive offenses committed during the course of the conspiracy, but to the agreement to commit those offenses, which embraces the entire period during which the conspiracy was in effect. *See Calabrese*, 825 F.2d at 1346.

[2] Recognizing that conspiracy is a continuing offense, the Guidelines contemplate the aggregation of all amounts of contraband involved in a conspiracy in determining the appropriate punishment for the conspiracy. *See* U.S.S.G. § 2D1.4, comment (note 1). *See also United States v. Alvarez-Cardenas*, 902 F.2d 734, 736 (9th Cir. 1990)(Guideline offense level determined by amount defendant conspired to sell). In applying the Guidelines the Fourth Circuit has expressly held that there is no violation of ex post facto principles when a court aggregates amounts transacted before and after the effective date of the Guidelines to determine the punishment appropriate for conviction of participation in a single ongoing conspiracy. *Sheffer*, 896 F.2d 842. The agreement to distribute the total amount of controlled substance involved in the conspiracy, the Fourth Circuit held, existed on the effective date of the Guidelines, "and every day thereafter until the conspiracy was affirmatively terminated." 896 F.2d at 845.

[3] We agree with the Fourth Circuit and reach the same result here. The principles of conspiracy allow a defendant to be punished for becoming a party to an agreement to facilitate the commission of substantive offenses, regardless of whether that defendant is also to be punished for those substantive offenses themselves. *Calabrese*, 825 F.2d at 1346. Under these principles, at the point of entering into an agreement, a conspirator becomes accountable for all conduct of the conspiracy, and proof of a slight connection to the conspiracy is sufficient to support such accountability. *United States v. Batimana*, 623 F.2d 1366, 1370 (9th Cir.), *cert. denied*, 449 U.S. 1038 (1980). When one agrees to be a member of a conspiracy, one agrees to all acts that have been or will be committed by the conspiracy, and, by virtue of that agreement, is responsible for such acts regardless of one's role in their commission. *See id.*

[4] Since agreement to participate in the conspiracy occurs not only at the point of entry into the conspiracy but also on an ongoing basis until withdrawal or cessation of the conspiracy, it does not violate the prohibition against ex post facto laws to apply the standards that were in effect at the point at which the conspiracy terminated, in order to punish Inafuku for conspiracy to distribute the entire amount of contraband actually involved in the conspiracy. Inafuku continued to agree to be a party to an operation that had sold over 900 grams of a substance containing methamphetamine as of the effective date of the statute imposing the ten-year mandatory minimum, and remained a party to that conspiracy as it sold more contraband after the statute's effective date, ultimately passing the 1,000 gram mark. Inafuku failed to disengage from the conspiracy before the harsher punishment provisions became effective or before it had sold over 1,000 grams of contraband. Inafuku thus engaged in conduct punishable under the mandatory minimum sentence provisions after those provisions took effect. He is therefore appropriately punished under those standards.

Inafuku also challenges the imposition of a $17,500 fine. He claims for the first time on appeal that the district court did not have sufficient evidence to find that he had the ability to pay the fine. We review for plain error. *See United States v. Lopez-Cavasos*, 915 F.2d 474, 479 (9th Cir. 1990). The district court explained the imposition of the fine based upon examination of his income tax information and co-conspirators' statements suggesting that Inafuku had large sums of money to spend. The district court nevertheless imposed a fine on the low end of the Guideline range. There was no plain error.

AFFIRMED.

APPENDIX B

DISTRICT COURTS RULING ON MOTION

TO WITHDRAW PLEA

The district court, on March 28, 1990, after hearing evidence, made the following oral ruling on defendant HOWARD INAFUKU's motion to withdraw plea of guilty:

THE COURT: Under rule 32(D), for your motion to withdraw the plea, the defendant has to show a fair and just reason--generally, withdrawal of a guilty plea should be permitted if it was induced by fraus, mistake, imposition, coercion, deceit, misrepresentation, or defendant's misapprehension of his legal rights.

The Ninth Circuit said, in the Caldwell case, that "the inconvenience--the Court and prosecution--resulting from a change of plea is ordinarily slight, as compared with the public interest in protecting the right of the accused at trial by jury."

And, in the Buckells case, the Eleventh Circuit set out the following factors to be analyzed: One, whether close assistance of counsel was available; two, whether the plea was knowing and voluntary; three, whether judicial resources would be--would be conserved; four, whether the government would be prejudiced.

The court has analyzed each one of those factors, in regard to this case. There clearly was close assistance of counsel.

The Court found, at the time the plea was made--and finds now--that the plea was knowing and voluntary.

Judicial resources would be conserved.

The government would be prejudiced--the question of whether they could relocate all of their witnesses--although the Court is not placing a great deal of

wight on prejudice to the government; the Court's not sure whether there is any legal prejudice thee.

Consideration of a motion to withdraw guilty plea does not involve any question of guilt of innocence, although, in this case, the Court does not that Mr. Inafuku is not asserting his innocence, and that is a factor that some Courts weigh, in determining whether or not to allow a plea withdrawal.

Trial courts should not undertake to decide the merits of a proffered defense, although, of course, in this instance, I don't believe a defense has even been proffered.

It's really the question of Mr. Minn arguing whether or not the mandatory minimum is appropriate, and, also, whether a defendant is misled by reference to a higher guideline than is absolutely applicable.

The Ninth Circuit has said, in United States versus Rio Ortez--or--yes--Ortez--that defendant's change, in part, is not sufficient as a fair and just reason for a withdrawal.

The Court again notes that, in this case, the objections to the presentence report, the defendant had considered all of these arguments and--or, at least, the mandatory minimum argument--stated that, after a conscious deliberation, decided not to challenge them.

The Ninth Circuit did state, in the Vasquez case, that a general rule is that a defendant who has entered a guilty plea, on the advice of competent counsel, will usually not be permitted to withdraw that plea.

The court has also reviewed the Pressly case of this circuit, where a defendant was allowed to withdraw his guilty plea; and, there, the court said,

"appellant's statement, at the time he attempted to withdraw the guilty plea, suggests that he may not have understood that the plea bargaining arrangement allowed the judge to impose a sentence as severe as ten years' imprisonment," so the defendant there didn't realize how severe a sentence he was exposed to by pleading guilty. That's no our situation here.

The proffer of Attorney Young's testimony was that he reviewed the plea agreement with the defendant at least three times; that he instructed the defendant to read it over and question him on any points he didn't understand. The defendant did raise some questions. Mr. Young explained other provisions. Mr. Young believed that the defendant understood every provision of the plea agreement.

Mr. Young estimated that the guideline range might be 37 to 39 level,

and that one way that the defendant might lower that would be to cooperate with the government, but that there would be no guarantee that the cooperation would lower the sentence, at all, and he would simply be relying on the good faith of the government.

And the Court's questioning of Mr. Inafuku as to whether he understood the plea agreement, Mr. Inafuku stated that he understood the provision in paragraph 9, to the effect that the entery of the guilty plea, pursuant to the agreement, is not based on any understanding of the defendant that he would fall within a particular sentencing range, is subject to any specific provision of the guidelines--or not be subject to any specific provision of the guidelines, and also that there is no promise or guarantee of the applicability or non-applicability of any guideline, or any portion thereof,

notwithstanding any representations or predictions from any source.

The Court believes that Mr. Inafuku understood that at the time that he made the guilty plea. The Court has noted the intelligence evidenced by Mr. Inafuku on the stand, and Mr. Inafuku also agreed that the only area of uncertainty in Mr. Young's advice was with respect to the guidelines.

The Court finds that Mr. Young's advice was not incompetent. He admitted that he wasn't sure what the guideline sentence was, and that's exactly what the plea agreement says, that regardless--that the defendant's not relying on any source as to what the level of the guideline sentence might be.

So, for all of the foregoing reasons, the Court finds that defendant has not met his burden of showing a fair and just reason for withdrawal of his guilty plea.

The Court will deny the motion and ask M. Peyton to prepare the order.

APPENDIX C

TRANSCRIPT OF SENTENCING IN THE DISTRICT COURT

After the sentencing hearing on March 30, 1990, the District Court imposed the following sentence:

THE COURT: Statutory maximum as to counts one, being a preguideline count is 20 years. The guideline range in this case, with there being a stautory minimum of 10 years as to county six, as the Court has previously found, is 120 to 121 months.

The Court will therefore sentence you, considering the seriousness of the crimes involved, as to count one, 10 years; as to counts two, three, four, and six, 10 years; as to count seven and eight, 12 months; with all counts to run concurrently to count one.